

Fair Political Practices Commission
Memorandum

To: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Approval of 2002 Regulatory Priorities

Date: October 26, 2001

This memorandum outlines the staff's recommendations for the Commission's priorities in CY2002. This memorandum presents the recommendations in narrative form. In December, the adoption memorandum will show the proposed regulations on a chronological table. The rulemaking plan will also allow for quarterly review and revision and will attempt to spread the workload as evenly as possible throughout the year, noting some nonregulatory projects as well.

A final note, January 1, 2002 will be the one-year anniversary of Proposition 34's addition to the Political Reform Act. The bulk of Proposition 34 regulations were completed in CY2001. Thus, we will no longer be separately setting out Proposition 34 regulations as a group.

The staff requests that the Commission approve or disapprove each of the recommendations and the priority at which they are set. Based upon those decisions, the staff can return in December 2001, with a formal calendar on which the Commission may take final action.¹

I. 1st Quarter 2002

The agendas for the first quarter of the year will be primarily filled with the adoption hearings for regulations considered at the pre-notice stage in the 4th quarter of 2001. Currently, the following items are under consideration in November, with an anticipated adoption in January.

- **Personal Loans (Section 85307):** Section 85307 prohibits a candidate for elective state office from personally loaning to his or her campaign an amount, the outstanding balance of

¹ Last year the recap of the 4th quarter of CY2000 was included in the memorandum concerning the "Approval of Regulation Calendar for the Year 2001" presented at the October 2000 Commission Meeting. However, staff believes that a discussion of the CY2001 4th quarter calendar would be premature before the results of the November 2001 and December 2001 meetings can be fully considered due to the large number of regulations up for consideration in November and December. Thus, the recap of the 4th quarter 2001 will be a separate agenda item for the Commission in January 2002.

which exceeds \$100,000. Proposition 34 does not clearly set forth what types of loans are considered personal loans subject to the \$100,000 prohibition. For example, does the \$100,000 limit apply to loans made by a business wholly owned by a candidate and his or her immediate family? How does the \$100,000 limit affect outstanding loan balances that existed before January 1, 2001?

- **Phase 2 -- Appointed Boards and Commissions (Regulation 18707.4):** Regulation 18707.4 permits public officials to represent certain constituencies, which they are explicitly appointed to represent. Under regulation 18707.4, as long as certain conditions are met, a public official can participate in a decision when the decision has a reasonably foreseeable material financial effect on his or her economic interest. Under some circumstances, the staff has applied this rule to officials who are appointed to represent a specific economic interest, even where the decision impacts an economic interest other than the interest the official is expressly required to represent. For example, an official is appointed to represent senior citizens, but receives income from a senior citizens' group home, not any specific senior citizen. It would not be consistent with the purposes of the regulation to advise that the official's employment in the field was a disqualifying economic interest.
- **Advertising Disclosure -- Sections 84501-84510:** These provisions are surviving provisions added by Proposition 208. The purpose of the advertising disclosure rules is to inform voters of the "big money" behind political advertisements. However, interpretive issues exist with respect to whether advertisements for or against a ballot measure are subject to sections 84502-84504 or section 84506 (governing independent expenditures), or both. Additional issues that may be clarified by regulation: what types of advertisements are subject to the rules; are there exceptions; clarification of the term "cumulative contributions" as defined in section 84502; the treatment of independent expenditure advertisements under section 84506; the specific content of the disclosure; and under what circumstances must a disclosure be amended.
- **Paid Spokesperson -- Section 84511:** Proposition 34, passed in November 2000, added section 84511 which addresses paid spokesperson disclosures in ballot measure advertising. Section 84511 requires filing and disclosure by any committee when a spokesperson appears in an advertisement and is paid \$5,000 or more.

Currently, the only items slated for a pre-notice hearing or emergency adoption in December 2001 (with anticipated adoption or permanent adoption in February 2002 or later) are:

- **Lobbyist Contributions (Section 85702):** Section 85702 prohibits contributions by a lobbyist to elected state officers or candidates for elected state office, if the lobbyist is registered to lobby the government agency of the elected state officer or the agency to which the candidate seeks election.
- **Aggregation of Contributions (Emergency Adoption):** Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing

of elections. (Section 84211.) Originally, regulation 18428 implemented the Commission's *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a "combination of persons" to file one campaign statement. The regulation defined "affiliated entities" as "a person or group of persons whose campaign contributions are directed and controlled by another." This is the first appearance of the "direction and control" language. This standard remained on the books until 1996. At that point, it was amended to reference who "established, finances, maintains, or controls" the Proposition 208 standard for determining whether entities should aggregate their contributions. In 1995, the Commission also adopted regulations 18215.1 and 18225.4. These regulations replaced a Proposition 73 regulation.

Section 85311 of Proposition 34 codifies former regulation 18215.1 and establishes a "direction and control" standard for determining whether entities should aggregate their contributions. The Commission will consider issues raised by regulations 18428, 18215.1, 18225.4, and 18531.1 and possibly adopt a new affiliation regulation applicable to the contribution limits of Proposition 34. Staff anticipates emergency adoption of a regulation in December 2001, with normal pre-notice and permanent adoption of the amendments later in 2002.

II. First Priority Items

The following Conflict of Interest projects were approved at the October 2001 Commission meeting:

- **Phase 2: Regulation 18704.2:** Regulation 18704.2 sets out a list of factual situations in which an official's real property interest is considered directly involved in a governmental decision. In December of 2000, the Commission added two situations (formerly defined as "indirect" situations) into Regulation 18704.2. These provisions dealt specifically with (a) real property located within 300 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision, and (b) decisions involving the construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities. In connection with this relocation of text, the Commission also increased the distance at which an official's real property is considered to be directly involved from 300 feet to 500 feet.

In this regard, an issue has arisen as to whether the "500 foot rule" embodied in Regulation 18704.2 is applicable only to the decisions expressly set forth in the regulation, or whether it can be applied to decisions that are not expressly included in the regulation. A literal reading of the new language would limit the "500 foot" test only to those decisions listed in (a)(1) through (a)(6). In other words, an official with real property within 500 feet (or 50 feet for that matter) of real property subject to a decision not expressly listed in (a)(1) through (a)(6) would be subject to a presumption of nonmateriality.

- **Phase 2: Conflict of Interests and General Plans:** Some agencies are viewing general plan amendments as coming with the purview of “zoning or rezoning” decisions under subdivisions (a)(1) and (a)(6) of the regulation. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the “public generally” or “legally required participation” exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. Staff is anticipating regulatory action involving clarification of and refinement to the conflict of interest rules as applied to these types of decisions. This project will also include consideration of the “segmentation and bifurcation” procedures referred to in Commission advice letters. The procedure is used when a governmental decision may be “segmented” into a series of decisions in which a public official may have a conflict in one decision in the series but not others.
- **Phase 2, Regulation 18705.1:** Regulation 18705.1 sets forth the materiality standards applicable to business entities in which the public official has an interest. The Commission adjusted the indirect materiality thresholds to reflect changes resulting from inflation since the original adoption of the regulation. The regulation also references the listing criteria for various stock exchanges as an alternative benchmark for the application of graduated materiality standards based on the size of the business. Put another way, these are self-adjusting benchmarks that correlate different materiality standards to businesses of various sizes.

There has been some feedback from the regulated community to the effect that the complexity of the listing criteria for the various exchanges makes it difficult for officials to use them in determining the appropriate materiality standard for a business interest. The assertion is that a public official cannot tell without extensive analysis whether a given business investment meets the criteria for listing on a given stock exchange. The initial review of the listing criteria for the various exchanges does bear out the regulated community’s contention as to the complexity of the listing criteria. However, to strike an appropriate balance between “user-friendly” criteria and criteria that accurately gauge the size of a given business, it will take further research and work by staff to develop alternatives for Commission consideration.

- **Phase 2: Regulation 18707.3:** Regulation 18707.3 provides an exception geared specifically toward small jurisdictions. Several amendments were made to this regulation to make it consistent with the amended materiality regulations applicable to real property. The City of Yountville has also raised concerns with the application of this regulation in that it incorporates the “500 foot rule” as one of the preconditions for application of the “public generally” exception for small jurisdictions. Basically, when a circle is drawn using a 500 foot radius from the residences of city council members, the resultant areas encompass much of the town. Staff is currently reviewing the regulation to see if language can be tailored to meet this unique concern of small cities.

Other first priority items are as follows:

- **Political Party Definition (Section 85303):** Section 85303 provides limitations on contributions “for the purpose of making contributions to candidates for elective state office.” Section 85303 also provides a higher contribution limit for political party committees. Criteria for determining when a contribution falls within this section may be required.
- **Clarify the definition of “Independent Expenditure”:** Section 82031 defines “independent expenditure” to mean “an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.” There is currently no regulation clarifying this rule. The Commission may wish to consider a clarifying regulation.
- **Regulation 18991: Selection of Local Candidates and Controlled Committees for Audit:** Regulation 18991 dictates the procedure that shall be followed by the Commission for selecting local candidates and their controlled committees for audit by the Franchise Tax Board. It specifies a random selection process, in which cities and counties are grouped together by population, and then varying percentages of each group are selected for audit. According to subdivisions (d) and (e) of Regulation 18991, the population information that shall be used in determining how cities and counties will be grouped, is the most recent decennial federal census. Subdivision (e) of Regulation 18991 allows the population of a new city – *one that has come into existence since the last census* – to be determined by “other reliable data.”

Two problems have become evident with this process. First, the use of two different sources for population data seems to inject an element of unfairness into the selection process. Second, the use of data as old as ten years for existing cities and counties simply ignores the dynamic population changes that occur in the state.

The “E-1 Report of City and County Population Estimates” is prepared annually by the Demographic Research Unit of the California Department of Finance. This report has always been available on a timely basis and has been used for new cities. Additionally, the Demographics Unit has been designated as the “single official source of demographic data for State planning and budgeting.” Thus, the Commission may wish to amend subdivisions (d) and (e) of Regulation 18991, to delete the references to “the most recent decennial federal census” that are contained in those subdivisions, and replace them with references to “the most recent annual population estimates compiled by the California Department of Finance.”

- **Lobbyists: Public Utilities Commission (AB 1325):** Modifies the definition of payments to influence legislative or administrative action to include payments for the purpose of influencing a ratemaking or quasi-legislative proceeding before the PUC. Existing

provisions of the Act generally define a “lobbyist” as an individual who receives \$2,000 or more in a calendar month or whose principal duties are to communicate directly or through agents with an elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. This bill would provide that a proceeding before the PUC constitutes “administrative action” for purposes of this provision if the proceeding is a “ratemaking proceeding” or a “quasi-legislative proceeding” as defined by this bill, except as specified. Amendments will be needed to make the Commission’s regulations consistent with this legislative change.

- **Cost of Living Adjustment to Contribution and Expenditure Limits; Statutorily Required Changes (Section 83124):** Pursuant to section 83124, the Commission must adjust the contribution limitation and voluntary expenditure limitation provisions in sections 85301, 85302, 85303, and 85400 in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars for limitations on contributions and one thousand dollars for limitations on expenditures.
- **Annual Technical Clean-up:** The Commission is presented this month with a number of changes to Commission regulations that resulted from the staff’s annual review for technical and other minor changes.

III. Second Priority Items

- **Regulation 18452 – CalPERS’ Reporting Requirements:** Section 84225 requires candidates for the Board of Directors of CalPERS to file certain campaign reporting statements. Regulation 18452, as directed by statute, sets forth the filing schedule and describes the contents of those statements. Earlier this year, CalPERS prepared an election schedule that provided for runoff elections under certain circumstances, requiring amendment of Regulation 18452, since the regulation makes no provision for the filing of statements required by law during runoff election cycles. In addition, it is unclear where these candidates file.

IV. Third Priority Items

- **Regulations 18741.1; 18746.1 - Permanent Ban on Post-Employment Activities:** This involves proposed amendments to regulation 18741.1, relating to the “permanent ban” on post-employment activities. Under the Political Reform Act, former officials in state government are prohibited from attempting to influence proceedings in which they participated when under government employment. (Sections 87401 and 87402.) A former official has “participated” where he or she has had “personal and substantial” involvement in the proceeding. In 1999, the Commission adopted regulation 18741.1 interpreting sections 87401 and 87402. That regulation provides that a supervisor is deemed to have participated in any proceeding which was “pending before” the official’s agency and which was under his or her supervisory authority.

In the *Lucas* Opinion, O-00-157, the Commission interpreted this regulation in the context of a high-level official of the Board of Equalization. In so doing, the Commission concluded that even though the official technically had “supervisory authority” over all employees under his chain of command, the official was not a “supervisor” of those employees within the meaning of the regulation, and therefore, did not participate in audits conducted by the lower-level employees. The Commission distinguished this interpretation with the 1990 Commission interpretation reflected in the *Brown* Advice Letter, No. A-91-033, which applied the ban to the former chief of the Enforcement Division of the Commission.

The Commission instructed staff to amend regulation 18741.1 to reflect this distinction. It is anticipated that other technical changes may also be made to this regulation and regulation 18746.1. However, since the regulatory amendment would be a conforming change (the *Lucas* Opinion has already resolved the issue), staff has placed this at a lower priority.

- **Regulation 18702.4-Exceptions for Spouses:** Regulation 18704.2 provides a series of limited exceptions to the definitions of “making,” “participating in making,” and “influencing” for purposes of the conflict-of-interest provisions of the Act. For example, making or participating in making a governmental decision shall not include actions by public officials relating to their compensation or the terms or conditions of their employment or contract. The issue has been raised as to whether this exception should be expanded to the official’s spouse.

V. Merged with Conflict of Interest Code Project (the “Project”) (if the Project is set for 2002)²

- **Clarify the definition of “Investment”:** Section 82034 defines “investment” to mean “any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value equals or exceeds two thousand dollars (\$2,000).”

The term “investment” does not include a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or a common trust fund which is created pursuant to Section 1564 of the Financial Code, or

² The memorandum on “Commission Planning Objectives for Calendar Year 2002” will also be considered on this agenda. It presents the Commission a choice of two major projects, one of which is the review of the conflict of interest codes and SEI procedures.

any bond or other debt instrument issued by any government or government agency. Investments of an individual include a pro rata share of investments of any business entity, mutual fund, or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater. The term "parent, subsidiary or otherwise related business entity" shall be specifically defined by regulations of the Commission.

Many of these terms (both in the definition) and the exceptions to the definition have never been clearly defined in regulation. For example, the treatment of retirement accounts (and assets held therein) has always been difficult under the statutory definition, both for disclosure and disqualification.

- **Duties of Filing Officers (Regulations 18110 and 18115):** As a result of the filing officer outreach program, the Technical Assistance Division would like to discuss whether filing officers who receive original campaign statements and statements of economic interests should be required to send written notice to nonfilers within a specified period of time following a filing deadline. In addition, the Commission may wish to codify its guidelines for imposing and waiving late filing penalties and perhaps require other filing officers to follow them. Finally, other current SEI filing officer requirements will be reviewed in light of recent energy/consultant issues.

VI. Monitor and Calendar as Necessary

At this time staff anticipates periodic updates to the Commission on the effectiveness of the Proposition 34 regulations and amendments adopted during the course of 2001. We will also advise the Commission on the need for new Proposition 34 regulations as necessary. We anticipate scheduling an update on Proposition 34 the regulatory calendar for May 2002. This will be in addition to any emergency items pertaining to Proposition 34 implementation. Finally, several projects will be on hold while the 2002 campaign season progresses in order to determine the appropriate scope and timing of the work on these projects. They are:

- **Acceptance and Return of Contributions.** Regulation 18215.2, an emergency regulation never permanently adopted, specified when a contribution is "accepted." Regulation 18531, amended by the Commission for purposes of Proposition 34 as part of the clean-up packet, describes when a contribution is deemed "not to have been accepted" for purposes of contribution limits. The Commission may wish to utilize the language of these two regulations previously adopted for the implementation of Proposition 208. If so, it may be helpful to explore the issue of when a contribution is "accepted" if the conditions of regulation 18531 are not carried out. Clarification on the manner in which a contribution may be made, accepted, or returned may be included in such an examination. Additionally, what effect, if any, section 85319 has on this regulation should be addressed.

In identifying the issues associated with defining and developing rules for making, receiving, accepting, and returning contributions, the issue of electronically transmitted contributions has presented issues that have not been formally addressed by the Commission. Specifically,

contributions which are made on websites and paid for by credit cards or made through payroll deductions, do not fit in the Commission's prior rules defining when a contribution is made, received, or accepted. Given the rise in electronically transmitted contributions, staff agrees that examination of this issue warrants additional analysis and specific regulatory language to clarify rules relating to these types of contributions.

- **Proposition 34; Review of Recordkeeping:** Regulation 18401 sets forth the Commission's recordkeeping guidelines. Proposition 34, a campaign finance reform measure sponsored by the Legislature and passed in November of 2000, took effect on January 1, 2001. Proposition 34 repealed most of the provisions of Proposition 208, a campaign reform measure, which passed in the November 1996 elections and has been in litigation in federal court. In addition, Proposition 34 repealed several provisions of Proposition 73 in the Act, a campaign reform measure adopted in 1988, that were largely invalidated by court decision. New provisions added to the Political Reform Act by Proposition 34 impose mandatory limits on contributions received by candidates for elective state office and by committees that make contributions to candidates for elective state office. New law also subjects state candidates to voluntary expenditure limits. All of these changes in law require the review of and possible amendment to Regulation 18401 to support the new contribution and expenditure limits.
- **Update Regulation 18361.5 Re: ALJ:** Regulation 18361.5 sets out the procedure used for the Commission to consider proposed decisions by an Administrative Law Judge. However, the section has not been reviewed since 1994. Clarifying changes to the regulation may be necessary, as well as changes required to make the regulation consistent with recent changes in the law. This project would include a review of any necessary changes for the purpose of providing a status report for the Commission.